

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SECOND APPEAL No 20 of 2000

For Approval and Signature:

Hon'ble MR.JUSTICE K.M.MEHTA

=====

1. Whether Reporters of Local Papers may be allowed : YES
to see the judgements?
2. To be referred to the Reporter or not? : YES
3. Whether Their Lordships wish to see the fair copy : NO
of the judgement?
4. Whether this case involves a substantial question : NO
of law as to the interpretation of the Constitution
of India, 1950 of any Order made thereunder?
5. Whether it is to be circulated to the Civil Judge? :
To be circulated to family courts.

JAGDISH MANGTANI

Versus

GEETA JAGDISH MANGTANI

Appearance:

1. Second Appeal No. 20 of 2000
MR CL SONI for Petitioner No. 1
MR LM CHHABLANI for Respondent No. 1

CORAM : MR.JUSTICE K.M.MEHTA

Date of decision: 22/01/2002

ORAL JUDGEMENT

Jagdish Mangtani-appellant husband (original petitioner) has filed this Second Appeal under Section 100 of C.P.C. against the judgement and decree dated 15.12.1999 passed by the learned Joint District Judge,

Kutch at Gandhidham in Regular Civil Appeal No. 189 of 1999. The learned judge by his impugned judgement and decree was pleased to allow the appeal filed by Smt. Geeta Jagdish Mangtani-wife (original respondent). The learned judge was pleased to quash and set aside the judgement and decree dated 18.6.1999 passed by the learned Civil Judge (S.D.), Gandhidham, in Hindu Marriage Petition No. 14 of 1998 filed by Shri Jagdish Mangtani-appellant husband. The learned Trial Judge has passed a decree of divorce between the appellant and the respondent wife by dissolving their marriage as provided under Section 13 of the Hindu Marriage Act.

2. The facts giving rise to this petition are as under.

2.1 Marriage of between Jagdish Mangtani-appellant husband and Geeta Jagdish Mangtani-respondent wife was solemnised on 2.11.1993 as per Hindu Customs at Ulhasnagar, Mumbai. At the time of marriage the husband was working in shop at meagre salary of Rs. 1400/- per month whereas the respondent wife was serving as primary teacher at Adipur, Gandhidham, drawing salary of Rs. 7000/- per month.

2.2 As per the facts as emerging from the record the appellant husband is residing with his parents and brothers in a joint family at Ulhasnagar, Mumbai. The respondent wife originally is staying at Adipur, Gandhidham (Kutch). They both jointly stayed for some time in Mumbai. However, after the marriage the respondent took leave and came to Ulhasnagar and at that time she proposed the petitioner to settle at Adipur as she was serving in a primary school as teacher at Gandhidham. The petitioner did not agree to it that led to some dispute and difference and also led to quarrel between the appellant and the respondent.

2.3 It was submitted that somewhere in February, 1993 the respondent wife conceived and ultimately on 2.6.1993 the wife went to her parents' house for the purpose of delivery and rest. However, after that the boy was born on 11.11.1993. The wife thereafter has not returned to matrimonial house and thereby the respondent wife has deserted the husband.

2.4 From the record it appears that the appellant-husband addressed a notice dated 30.9.1996 through his advocate to the respondent wife at Exh. 21 in which it was stated that after the marriage the respondent wife was interested in job as teacher in Nagarpalika school at Anjar and to settle at Adipur and

therefore the respondent was pressurising the appellant-husband to resign his job and to settle in Adipur. As the appellant-husband was not agreeable for the same, quarrel started in this behalf.

2.5 The respondent wife replied to the said notice on 14.10.1996 at Exh. 22 and denied the contention of the petitioner husband. The respondent wife has stated that she is prepared to stay at matrimonial house at Mumbai.

2.6 The appellant-husband has issued another notice dated 21.10.1996 to the respondent wife which is at Exh. 23 and reiterated what has been stated in the notice dated 30.9.1996. It was stated that the respondent wife has left her matrimonial house without any reasonable cause. It was reiterated that the appellant husband has decided to settle at Ulhasnagar with his parents and he is not interested in resigning his present job and to reside at the in-law's house at Adipur as son-in-law. It appears that the respondent wife has also replied to the said notice vide her letter dated 4.12.1996 denying the contentions in the said notice. The respondent wife has stated that she is always ready to leave the job of Anjar and she is ready and willing to settle and live with the petitioner-husband.

2.7 In view of the above, ultimately the appellant-husband has filed petition for divorce. Originally the appellant-husband filed petition being H.M.P. No. 754 of 1996 in the court of Civil Judge (S.D.), Kalyan on the ground of desertion as contemplated under Sections 13(1)(ia) and 13(1)(ib) of the Hindu Marriage Act, 1955. The said petition was filed on 31.12.1996. In the said application the respondent wife filed written statement on 14.9.1997 before the learned Civil Judge (S.D.), Kalyan. Ultimately, the same was transferred to the Court of Civil Judge (S.D.), at Gandhidham (Kachchh) and numbered as H.M.P. No. 14 of 1998.

2.8 After the transfer of the petition to the Court of Civil Judge (S.D.) at Gandhidham-Kachchh, the appellant husband was examined at Exh. 19. In the deposition also the husband stated that he is staying with his parents in a joint family and the wife was serving as a teacher at Gandhidham. The respondent wife did not agree to stay at Ulhasnagar, Mumbai and therefore it led to quarrel between the appellant husband and the respondent wife. The appellant husband made efforts to bring the respondent wife but she was not prepared to

leave the job at Gandhidham and to come to her matrimonial home at Ulhasnagar. It was stated the appellant husband was drawing salary of Rs. 1400/- per month whereas the respondent wife was getting salary of Rs. 3000/- per month.

2.9 On behalf of the husband his brother was Jetho Mangtani was also examined at Exh. 27. However, his evidence is not material and therefore, I am not referring to the same. Before the Trial Court, respondent wife Ms. Geetaben was examined at Exh. 29. In her deposition she has stated that at the time of her marriage the appellant was getting salary of Rs. 1400/whereas she was getting salary of Rs. 7500/- and if she leaves the job of teacher at Gandhidham and goes to Ulhasnagar, Mumbai, it will not be possible for them to live in a joint family with the meagre salary of Rs. 1400/- of the husband. It was also stated if the husband earns approximately Rs. 5000/- then she is prepared to stay at Ulhasnagar in this behalf. Except maintenance there is no other dispute and difference in this behalf. It was admitted that from 2.6.1993 she has left matrimonial house and staying at Gandhidham. The respondent wife has examined one Shri Popatlal who is a neighbour. However, his evidence is not relevant and therefore I am not referring to the same.

2.10 Before the trial court the matter was heard and ultimately the trial court framed the following issues which have been answered.

- (i) Whether the petitioner proves that the respondent has committed an act of cruelty with the petitioner?
- (ii) Whether the petitioner proves that the respondent has wilfully abandoned the petitioner?
- (iii) Whether the petitioner is entitled a decree of divorce?
- (iv) What order?

2.10A The learned trial judge while giving his finding has stated that the petitioner-appellant husband proved that the respondent wife has committed the act of cruelty with the petitioner-husband. The petitioner-husband has also proved that the respondent wife has lawfully abandoned the petitioner-appellant husband.

2.11 In view of the above, the trial court has after considering the evidence on record, come to the

conclusion that the petitioner-husband has been able to prove the ingredients of Section 13(1)(ia) and Section 13(1)(ib) of the Act and the petitioner husband is entitled to a decree of divorce in this behalf.

3. Being aggrieved and dissatisfied with the said judgement the respondent wife filed appeal being Regular Civil Appeal No. 189 of 1999 before the Joint District Judge, Kachchh on 13.7.1999. The Joint District Judge, Kachchh at Gandhidham by his judgement and decree dated 15.12.1999 has held that the trial court has erred in holding that the respondent wife has committed an act of cruelty towards the petitioner-husband by abandoning the petitioner-husband and the petitioner husband was entitled to obtain a decree of divorce. The learned appellate judge also held that the learned trial judge has not properly considered the fact that decree of divorce granted by the trial court is improper and illegal. The learned appellate judge has held that if a woman gets good designation or good job on the strength of her education and if a husband is not earning good income and is residing at another place after the marriage, wife cannot be compelled, according to orthodox Hindu mythology, to leave her good services or status and to stay at the husband's place. If a woman refuses to do so, she cannot be called upon to be ready for divorce. If it is so acted upon, it would be an insult to the woman's pride and it would amount to denial of a woman's right of equality. In view of the same, the learned appellate judge has held that it cannot be said that the wife has abandoned her husband or has committed an act of cruelty towards the husband by abandoning the husband and the husband was entitled to obtain the decree of divorce.

4. Being aggrieved and dissatisfied with the aforesaid order of the learned appellate judge, the appellant husband has filed this Second Appeal before this court. When the Second Appeal was admitted on 8.8.2000 the following substantial question of law was formulated by the then learned judge which read as follows:

"Whether the respondent wife's insistence of not leaving job (service) to join her husband's matrimonial home amounts to desertion and whether the appellant husband is entitled for decree of divorce on this ground as provided under Section 13(1)(ib) of the Hindu Marriage Act, 1955?

4A This matter was heard on 24th and 26th December, 2001. Arguments were over. However, at that time both

the learned counsel stated that before the court pronounces the judgement, they may try to settle the matter and if need arises both parties will come to this court and this court can enquire about the desire of husband and wife. Due to paucity of time both could not come to this court and ultimately on 15th January, 2002 both husband and wife came to Ahmedabad and I have called both the parties in my chamber jointly and thereafter I have heard them in my chamber independently. I have requested both the parties to join together and live together happily as husband and wife in the matrimonial home but unfortunately both parties were adamant and the matter could not be resolved and that is why I have to give the judgement.

5. On behalf of the appellant husband Mr. C.L. Soni, learned advocate appeared whereas on behalf of the respondent wife Mr. L.M. Chhablani appeared. The learned advocate for the appellant husband has relied on Section 13(1)(ia) and Section 13(1)(ib) of the Hindu Marriage Act, 1955 which read as under:-

"13 Divorce - (1) Any marriage solemnized, whether before or after the commencement of this Act, may, on a petition presented by either the husband or the wife, be dissolved by a decree of divorce on the ground that the other party -

(i)xxxxxxxxxx

(ia) has, after the solemnization of the marriage, treated the petitioner with cruelty; or

(ib) has deserted the petitioner for a continuous period not less than two years immediately preceding the presentation of the petition; or

(ii) & (vii) xxxxxxxx

Explanation - In this sub-section the expression 'desertion' means the desertion of the petitioner by the other party to the marriage without reasonable cause and without the consent or against the wish of such party and includes the wilful neglect of the petitioner by the other party to the marriage, and its grammatical variations and cognate expressions shall be construed accordingly."

6. The learned counsel for the appellant stated that when the respondent wife had agreed to marry the appellant she knew that the appellant husband was earning meagre income of Rs. 1100/- to Rs. 1400/- per month and at the time of marriage also she knew that she got married to a person earning very meagre salary. Now therefore when with full knowledge if the respondent wife had married the appellant husband, then subsequently living separately from the husband on the ground that the husband's income was not sufficient, was nothing but a deliberate desertion by the respondent wife. It was submitted that leaving of matrimonial home by the respondent wife is without any reasonable cause. Therefore, the appellant husband was entitled for a decree of divorce under Section 13(1)(ib) of the Act.

7. The learned counsel for the appellant husband has further submitted that in any case looking to the facts and circumstances of the case as well as the evidence on record it has been clearly established that the respondent wife in no circumstances wants to join her matrimonial house of the husband unless the income of the husband reached the stage of Rs. 5000/- per month. This contention of the respondent wife is nothing but a

condition of wife to the effect that so long the income of the husband continues to be below Rs. 5000/- she is not inclined to join the matrimonial home of the husband. Thus, the respondent wife has deliberately deserted the appellant husband with no intention to go to the matrimonial home and in view of this position, the appellant husband was in all circumstances entitled for the decree of divorce.

8. The learned counsel for the appellant husband further submitted that it is clearly revealed that it is the respondent wife's insistence not to leave the job (service) she is doing at Anjar has rendered the main cause for her because she believed that she is earning much more amount than her husband and, therefore, she is justified in not joining the matrimonial home of her husband who is earning a meagre income.

9. It may be noted that originally the ground of cruelty was alleged in the petition but at the time of hearing of the Second Appeal was heard on the ground of desertion. Therefore, I am not considering the ground of cruelty in the present Second Appeal.

10. The learned advocate for the appellant husband relied on the judgement of the Hon'ble Supreme Court in the case of ADHYATMA BHATTAR ALWAR VS. ADHYTMA BHATTAR SRI DEVI reported in (2001) AIR SCW 4641 = AIR 2002 SC 88.

10.1 In Adhyatma Bhattar Alwar Vs. Adhyatma Bhattar Sri Devi (supra) the facts were that the appellant Adhyatma Bhattar Alwar and the respondent Adhyatma Bhattar Sri Devi were married on 22nd August, 1978 in Nalamvari Choultry at Rajahmundry. The couple stayed together in village Palacole where the parents of the husband reside. A female child was born to them on 12th December, 1979 whereafter they separated. The wife and the daughter lived with her parents at Rajahmundry, while the husband continued to stay with his parents at Palacole. The husband filed a petition for dissolving the marriage under Section 13 of the Hindu Marriage Act, 1955 praying for a decree for divorce on the ground stated in sub-clause (ib) of sub-section (1). In the petition it was alleged that the father of the respondent wife had taken her to Rajahmundry for delivery and also stating that her mother was not well. After the birth of the child, since the respondent did not return to Palacole, the appellant, his father and other relations made attempts to persuade the respondent's father to send his daughter to Palacole. The attempt did not bear fruit as the respondent was insistent that the appellant should live separately from his parents in a separate house. Since the condition was not acceptable to the appellant, she refused to join him at Palacole. On 23rd May, 1981 the appellant went to Rajahmundry to bring the respondent but she was not sent and the appellant was informed that the respondent would be sent only after he got a job. As he appellant could not be able to get a job, the respondent wife did not join matrimonial home and all attempts to persuade the respondent to come and live with him failed. The appellant therefore filed the petition for divorce on the ground of desertion by the wife for a period of more than two years.

10.2 The respondent wife contested the said petition before the Trial Court. The Trial Court held that the appellant had satisfactorily proved that the respondent was guilty of having deserted him for a continuous period of more than two years preceding the filing of the petition for divorce and that he was entitled to a decree for judicial separation under Section 10 of the Act instead of decree for dissolution of marriage under Section 13(1)(ib) of the Act.

10.3 Being aggrieved and dissatisfied with the judgement of the Trial Court, both the appellant and the respondent filed appeal before the High Court of Andhra Pradesh. The High Court of Andhra Pradesh set aside the judgement and decree of the trial Court, allowed the appeal filed by the respondent wife and dismissed the appeal filed by the appellant husband. The High Court held that the wife did not have at any time the necessary animus to put an end to the matrimonial relationship and never intended to desert her husband. In view of the same, Special Leave Petition was filed before the Hon'ble Supreme Court.

10.4 In ADHYATMA BHATTAR ALWAR's case (supra) at para 6 on page No. 91 the Hon'ble Supreme Court has observed thus:

"The clause lays down the rule that desertion to amount to a matrimonial offence must be for a continuous period of not less than two years immediately preceding the presentation of the petition. This clause has to be read with the Explanation. The Explanation has widened the definition of desertion to include 'wilful neglect' of the petitioning spouse by the respondent. It states that to amount to a matrimonial offence desertion must be without reasonable cause and without the consent or against the wish of the petitioner. From the Explanation it is abundantly clear that the legislature intended to give to the expression a wide import which includes wilful neglect of the petitioner by the other party to the marriage. Therefore, for the offence of desertion, so far as the deserting spouse is concerned, two essential conditions must be there, namely, (1) the factum of separation, and (2) the intention to bring cohabitation permanently to an end (animus deserendi). Similarly, two elements are essential so far as the deserted spouse is concerned; (1) absence of consent, and (2) absence of conduct giving reasonable cause to the spouse leaving the matrimonial home to form the necessary intention aforesaid. The petitioner for divorce bears the burden of proving those elements in the two spouses respectively and their continuance throughout the statutory period."

10.5 The Hon'ble Supreme Court has allowed the appeal and set aside the judgement of the High Court of Andhra

Pradesh and the judgement of the Trial Court was restored.

11. Thereafter, the Hon'ble Supreme Court has, after considering its judgements in the case of BIPIN CHANDER JAISINGHBHAI SHAH VS. PRABHAWATI reported in AIR 1957 SC 176; LACHMAN UTAMCHAND KIRPALANI VS. MEENA reported in AIR 1964 SC 40, ROHINI KUMARI VS. NARENDRA SINGH reported in AIR 1972 SC 459, SANAT KUMAR AGARWAL VS. NANDINI AGARWAL reported in AIR 1990 SC 594, and also CHETAN DASS VS. KAMLA DEVI reported in AIR 2001 SC 1709, in para 12 on pages 94-95, observed as under:

"Para 12 - Coming to the case at hand, it is revealed from the evidence on record, as discussed in the judgements of the Trial Court and the High Court that the respondent wife had gone to her parents' house for birth of the child, which apparently cannot be construed as an expression of her desire to forsake her husband permanently; but after the birth of her child when attempts were made by the husband appellant, his parents and relations, she had laid down a condition that the appellant should live in a separate house from his parents taking the plea that her father in law had attempted to molest her, which explanation she signally failed to establish. In the meantime, father of the appellant expired some time in 1988, putting an end to the so-called reason of misbehaviour of her father-in-law. There is nothing on record that thereafter she expressed her desire to join her husband at the matrimonial home. It is relevant to state here that the appellant is the only son of his parents and as expected, he was not willing to establish a separate residence leaving his parents to live alone in their old age. The cumulative effect of the circumstances and the conduct of the respondent is that she had given expression of animus deserendi. Thus, the two ingredients of the matrimonial offence of desertion i.e. separation in fact and animus deserendi have been established by the appellant. The learned trial Judge, having regard to the facts and circumstances of the case, was right in recording the finding that the husband had successfully established the case of desertion by the wife and exercising the discretion vested under Section 13A of the Act, the learned trial Judge had granted the decree of judicial separation instead of divorce.

XXXXXXXXXX

The failure on the part of the wife to substantiate a serious allegation of infamous conduct of indecent advances said to have been made to her by the father-in-law, taken together with the absence and omission from her side to demonstrate her readiness and willingness to discharge her continuing obligation to return to the matrimonial home, establish sufficiently the animus deserendi, necessary to prove legal desertion as required under section 13(1)(b). The conduct of the wife seems to be more indicative of a firm determination not to return to the marital home and discharge the obligations attendant thereto. Therefore, the judgement of the High Court is unsustainable and has to be set aside."

11.1 The learned counsel for the appellant has relied on another judgement of the Hon'ble Apex Court in the case of G.V.N. KAMESWARA RAO VS. G. JABILLI reported in 2002 AIR SCW 162. In that case G.V.N. Kameswara Rao-the appellant husband is a double doctorate holder one in Mathematics from Andhra University and another from U.S.A. and had been working in United States during the relevant period. The respondent, G. Jabilli, is a post-graduate in Home Science and was working as a lecturer in the year 1979. The marriage between two was solemnised on 30.7.1979. After the marriage, the appellant and respondent stayed together for some period and thereafter the appellant left India for United States. The respondent was asked to join him after having obtained the visa and completing other formalities. The respondent, after a period of six months, joined the appellant in United States. It appears that the marital life of the appellant and the respondent ran into rough weather from the very beginning of their stay in United States. A daughter, Sandhya, was born to them, on 10.6.1981. In 1982, the appellant, respondent and their daughter Sandhya came to India but the appellant returned to United States in November, 1982 and the respondent joined him only in April, 1983. In January, 1985, the respondent along with her daughter returned to India and it seems that the misunderstanding between the parties deepened and ultimately the appellant filed application for divorce under Section 13 of the Hindu Marriage Act, 1955 alleging that after the solemnization of their marriage, the respondent treated the appellant with cruelty. In view of the said circumstances, the Family Court, after assessing the merits of the matter, held that the appellant husband was

entitled to get a decree for dissolution of marriage.

11.1A Being aggrieved and dissatisfied with the said order, the respondent wife filed appeal before the Division Bench of the High Court of Andhra Pradesh and the Division Bench of the High Court reversed the decision of the Family Court holding that the appellant was at fault and he had been trying to take advantage of his own wrongs and he was not entitled to get a decree for divorce.

11.1B Being aggrieved and dissatisfied with the aforesaid judgement of the Division Bench of the High Court of Andhra Pradesh, the appellant husband filed appeal before the Hon'ble Apex Court. The Hon'ble Supreme Court after considering the facts of the case, provisions of Hindu Marriage Act and also its judgements in Dr. N.G. Dastane Vs. Mrs. S. Dastane, reported in AIR 1975 SC 1534; S. Hanumantha Rao Vs. S. Ramani, reported in 1999(3) SCC 620; V. Bhagat Vs. D. Bhagat (Mrs.), reported in 1994(1) SCC 337, has held in para 18 thus:

"We do not think that this is a case, where the appellant could be denied relief by invoking Section 23(1)(a) of the Hindu Marriage Act. On the other hand, various incidents brought out in the evidence would show that the relationship between the parties was irretrievably broken, and because of the non-cooperation and the hostile attitude of the respondent, the appellant was subjected to serious traumatic experience which can safely be termed as 'cruelty' coming within the purview of Section 13(1)(ia) of the Hindu Marriage Act. Therefore, we hold that the appellant is entitled to the decree for dissolution of marriage under Section 13(a)(ia) of the Hindu Marriage Act."

11.1C The learned counsel for the appellant husband has relied on Halsbury's Law of England, fourth edition, 13 volume, page 284, para 575 where desertion has been defined thus:

"Para 575 - Desertion as proof of irretrievable breakdown of marriage - The court may find that a marriage has broken down irretrievably if the petitioner satisfies (see para 583) the court that the respondent has deserted the petitioner for a continuous period (see para 578) of at

least two years immediately preceding the presentation of the petition (see Matrimonial Causes Act, 1973 s. 1(2)(c)).

Para 576 - Meaning of desertion - In its essence desertion (see: Perry Vs. Perry (1952) P. 203 at 210, 211 / (1952) 1 All ER 1076 at 1079, C.A.) means the intentional permanent forsaking and abandonment (see Hopes Vs. Hopes (1949) p. 227 at 235) of one spouse by the other without that other's consent and without reasonable cause. It is a total repudiation of the obligations of marriage. In view of the large variety of circumstances and of modes of life involved, the court has discouraged attempts at defining desertion, there being no general principle applicable to all cases.

Desertion is not the withdrawal from a place but from a state of things, for what the law seeks to enforce is the recognition and discharge of the common obligations of the married state; the state of things may usually be termed, for short, 'the home'. There can be desertion without previous cohabitation by the parties, or without the marriage having been consummated.

The person who actually withdraws from cohabitation is not necessarily the deserting party. The fact that a husband makes an allowance to a wife whom he has abandoned is no answer to a charge of desertion."

Further in para 582 it is further observed thus:

"Elements of desertion; factum and animus. - For desertion to exist there must be both the factum, or physical separation, and the animus deserendi, or the intention to desert in the sense of bringing cohabitation to an end."

11.2 In Rayden on Divorce, Eighth edition, paragraph 124 on page 165 it is observed thus:

"Elements of desertion: factum and animus - For the offence of desertion there must be two elements present on the side of the deserting spouse, namely the factum, i.e. the physical separation and the animus deserendi i.e. the intention to bring cohabitation permanently to an end (see: 3 All E.R. 825) and two elements

present on the side of the deserted spouse, namely absence of consent (see: All E.R. 437) and absence of conduct reasonably causing the deserting spouse to form his intention to bring cohabitation to an end (see: 2 All E.R. 331). Desertion is a question of fact (see: 2 Q.B. 418) and so is the continuance of desertion (see: (1939) (3 All E.R. 437, 442), though it is a question of law whether any particular conduct is reasonably capable of having the necessary deserting or expulsive meaning ; desertion may be inferred from certain acts in one case which in another would not justify the same inference; the acts draw their significance from the purpose with which they are done as revealed by conduct or other expressions of intention. If a state of separation de facto exists during the relevant period, the primary question is whether or not that separation is attributable to an animus deserendi on the part of the respondent."

11.3 He has relied on Mulla Hindu Law, 16th Edition, at para 442 on page 487 regarding marital duties which means the wife is bound to live with her husband and to submit herself to his authority.

12.1 The learned advocate for the appellant-husband has also relied on the judgement of the Punjab and Haryana High Court in the case of MEENA RANI VS. MADAN LAL reported in II (1995) DMC 494. He has also relied on the decision of the Punjab & Haryana High Court in the case of SMT. KAILASH WATI VS. AYODHIA PARKASH reported in 1977 All India Hindu Law Reporter 175 in which at paras 45-46 on page 196, the Full Bench of the Court observed thus:

"Para 45 - Under Hindu law, the obligation of the wife to live with her husband in his home and under his roof and protection is clear and unequivocal. It is only in the case of some distinct and specified marital misconduct on the part of the husband, and not otherwise, that Hindu Law entitles the wife to live separately and claim maintenance therefor. This marital obligation has been further buttressed by clear statutory recognition by Section 9 of the Hindu Marriage Act. This provides for an immediate remedy where either of the spouses falters in his or her obligation to provide the society and sustenance to the other. Indeed, the obligation to live, together under a common roof is inherent

in the concept of a Hindu marriage, and, to mind, it cannot be torn as under unilaterally by the desire of the wife to live separately and away from the matrimonial home merely for the reason of either securing or holding a job elsewhere. Such an act would be clearly in violation of a legal duty and it is plain, therefore, that this cannot be deemed either reasonable or sufficient excuse for the withdrawal of the wife from the society of her husband, as visualised under Section 9 of the Act.

Para 46 - Again, under Hindu law, it is more than amply clear that the husband is entitled to determine the locus of the matrimonial home. Indeed, the obligation here is on the part of the wife to remain with him and under his roof. It deserves repetition that this legal obligation on the part of the wife is not without its co-related right. The husband in Hindu Law is obliged to maintain his wife during her life time and equally is under heavy obligations to sustain the minor children from the wedlock, the unmarried daughters till their marriage, his aged and infirm parents unable to maintain themselves, and a host of other duties to which detailed reference has been made in the earlier part of the judgement."

12.2 The learned counsel for the appellant husband has further relied on the Division Bench judgement of the Punjab & Haryana High Court in the case of SUNDARI DEVI VS. RAM LAL reported in I (1995) DMC 252 for similar principles. He has also relied on the judgement of the Allahabad High Court in the case of VINOD CHANDRA SHARMA VS. SMT. RAJESH PATHAK reported in II (1987) DMC 72.

13.1 Mr. Chhablani, learned counsel for the respondent wife has stated that in this case there is no doubt true that wife has left matrimonial home but it was with any reasonable cause. The case of the wife was that the appellant husband is earning very meagre income at Mumbai and stay in a joint family and when she is already earning Rs. 7000/- to Rs. 8000/- per month as a primary teacher at Gandhidham and if she leaves her Government job it will not be possible for her to get a suitable job at Ulhasnagar because of her qualification and therefore she is unable to leave the job and stays at Gandhidham. Though she has intention to stay in the matrimonial home but due to financial instability it is not possible for her to leave her government job particularly when she has

about 9 years boy whose future i.e. his education and welfare being considered in this behalf. The learned counsel for the respondent therefore submitted that in view of the peculiar facts and circumstances of the case the husband has failed to prove that wife has no intention to bring cohabitation to an end i.e animus deserendi and also the fact of separation. The learned counsel for the respondent submitted that the two ingredients namely the fact of separation and intention to live separately which is prime condition have not been proved by the appellant husband. Therefore, the essential ingredients are absent in this case and the appellant husband is not entitled to get a decree of divorce.

13.1A The learned counsel for the respondent wife has relied on the judgement of the Hon'ble Supreme Court in the case of Savitri Pandey Vs. Prem Chandra Pandey reported in 2002 AIR SCW 182. In that case the marriage between the appellant wife, Savitri Pandey, and the respondent husband, Prem Chandra Pandey was solemnised on 6.5.1987. The appellant wife lived with the respondent husband till 21.6.1987 and according to her, the marriage between the parties was never consummated. After 21.6.1987, the parties started living separately. There was a demand for certain more articles from the respondent husband which were also subject matter of the petition and ultimately it has been alleged that the respondent husband and his family members were alleged to have started torturing the appellant wife. Aggrieved by the attitude of the respondent husband and his family members, the appellant filed petition under Section 13 of the Act seeking dissolution of marriage by a decree of divorce on the ground of desertion and cruelty along with prayer for the return of the property and grant of permanent alimony. The respondent also filed a petition seeking divorce and grant of other reliefs. However, on 14.5.1996 the respondent filed an application for withdrawal of his matrimonial case which was allowed on 19.5.1996. However, the appellant wife had alleged that the respondent was having illicit relations with a lady residing in Gaya in Bihar with whom he was stated to have solemnised the marriage. The allegations made in the petition were denied by the respondent and it was stated that in fact the appellant-wife was taking advantage of her wrongs.

13.1B On the basis of the said pleading, the Family Court concluded that no evidence had been led to prove the allegations of cruelty and desertion. The court, however, held - "but it is proved that the respondent had

deserted the petitioner, hence the petitioner will get or is entitled to for a decree of divorce". However, on appreciation of evidence led in the case, the Division bench of the High Court held thus:

"We also do not find any evidence that the wife has been treated with cruelty by the husband. We are also of the view that there is no evidence that petitioner is deserted."

13.1C Being aggrieved and dissatisfied with the aforesaid judgement, the wife filed appeal before the Hon'ble Apex Court. It may be noted that during the pendency of the proceedings it has brought on record by the learned counsel for the appellant wife that after decree of divorce the appellant had remarried with one Sudhakar Pandey and out of the second marriage a child is also stated to have been born. That was an additional ground on which decree of divorce was also prayed. The Hon'ble Supreme Court in para 7A on page 187 has observed as under:

"Desertion", for the purpose of seeking divorce under the Act, means the intentional permanent forsaking and abandonment of one spouse by the other without that other's consent and without reasonable cause. In other words it is a total repudiation of the obligations of marriage. Desertion is not the withdrawal from a place but from a state of things. Desertion, therefore, means withdrawing from the matrimonial obligations, i.e. not permitting or allowing and facilitating the cohabitation between the parties. The proof of desertion has to be considered by taking into consideration the concept of marriage which in law legalises the sexual relationship between man and woman in the society for the perpetuation of race, permitting lawful indulgence in passion to prevent licentiousness and for procreation of children. Desertion is not a single act complete in itself, it is a continuous course of conduct to be determined under the facts and circumstances of each case."

13.1D The Hon'ble Supreme Court has, after relying on its judgements in the case of BIPINCHANDRA JAISINGHBHAI SHAH VS. PRABHAVATI reported in AIR 1957 SC 176 and LACHMAN UTAMCHAND KIRPALANI VS. MEENA ALIAS MOTA reported in AIR 1964 SC 40, held in paras 9, 10 and 12 as follows:

"Para 9 - To prove desertion in matrimonial matter it is not always necessary that one of the spouse should have left the company of the other as desertion could be proved while living under the same roof. Desertion cannot be equated with separate living by the parties to the marriage. Desertion may also be constructive which can be inferred from the attending circumstances. It has always to be kept in mind that the question of desertion is a matter of inference to be drawn from the facts and circumstances of each case.

Para 10 - There is another aspect of the matter which disentitles the appellant from seeking the relief of divorce on the ground of desertion in this case. As desertion in matrimonial cases means the withdrawal of one party from a state of things, i.e., a marital status of the party, no party to the marriage can be permitted to allege desertion unless he or she admits that after the formal ceremonies of the marriage, the parties had recognised and discharged the common obligation of the married life which essentially requires the cohabitation between the parties for the purpose of consummation the marriage. Cohabitation by the parties is an essential of a valid marriage as the object of the marriage is to further perpetuation of the race by permitting lawful indulgence in passions for procreation of children. In other words, there can be no desertion without previous cohabitation by the parties. The basis for this theory is built upon the recognised position of law in matrimonial matters that no-one can desert who does not actively or wilfully bring to an end the existing state of cohabitation. However, such a rule is subject to just exceptions which may be found in a case on the ground of mental or physical incapacity or other peculiar circumstances of the case. However, the party seeking divorce on the ground of desertion is required to show that she was not taking the advantage of his or her own.

Para 12 - No evidence was led by the appellant to show that she was forced to leave the company of the respondent or that she was thrown away from the matrimonial home or that she was forced to live separately and that the respondent had intended animus deserendi. There is nothing on record to hold that the respondent had ever

declared to bring the marriage to an end or refuses to have cohabitation with the appellant. As a matter of fact the appellant is proved to have abandoned the matrimonial home and declined to cohabit with the respondent thus forbearing to perform the matrimonial obligation."

13.1E The Hon'ble Supreme Court thereafter, after relying on the decisions in the case of ANITA SABHARWAL VS. ANIL SABHARWAL (1997 (11) SCC 490); SHASHI GARG (SMT.) VS. ARUN GARG (1997(7) SCC 565); ASHOK HURRA VS. RUPA ZAVERI (1997(4) SCC 226); MADHURI MEHTA VS. MEET VERMA (1997(11) SCC 81) and MS. JORDEN DIENGDEH VS. S.S. CHOPRA (AIR 1985 SC 935), in para 17 on page 191 held thus:

"As already held, the appellant herself is trying to take advantage of her own wrong and in the circumstances of the case, the marriage between the parties cannot be held to have become dead for invoking the jurisdiction of this Court under Article 142 of the Constitution for dissolving the marriage."

13.2 The learned counsel for the respondent has also relied on the judgement of the Hon'ble Apex Court in the case of CHETAN DASS VS. KAMLA DEVI reported in 2001 AIR SCW 1660. In that case from the facts it was found that Chetan Dass-appellant husband was living normally in upper storey with one Sosamma Thomas, a nurse, and has been taking his food and sleeping with her. The court found that it was against all norms and an open defiance to the matrimonial relationship. The said finding was also confirmed by the High Court. In that facts and circumstances of the case when the appellant husband filed petition for divorce, the Hon'ble Supreme Court after considering its own decisions in the case of CHANDERKALA TRIVEDI (SMT.) VS. DR. S.P. TRIVEDI reported in (1993) 4 SCC 232, ROMESH CHANDER VS. SAVITRI (SMT.) reported in AIR 1995 SC 851, SMT. SAROJ RANI VS. SUNDARSHAN KUMAR CHADHA reported in AIR 1984 SC 1562 and also after considering provisions of Section 23 of the Hindu Marriage Act, has held on pages 1667 thus:-

"In the present case, the allegations of adulterous conduct of the appellant have been found to be correct and the Courts below have recorded a finding to the same effect. In such circumstances, in our view, the provisions contained under Section 23 of the Hindu Marriage Act would be attracted and the appellant would

not be allowed to take advantage of his own wrong."

13.2A The learned counsel for the respondent wife has submitted that the old theory that after marriage the wife has to leave her parents and stay with her husband is an old orthodox theory. However, in view of Article 14 of the Constitution of India, the modern conditions are where the wife is also earning there is no justification or warrant to continue this orthodox theory. In support of the same, the learned counsel for the respondent wife has relied on the decision of the Delhi High Court in the case of MRS. SWARAJ GARG VS. K.M. GARG reported in AIR 1978 Delhi 296. In para 15 on page 301 the court has observed as under:-

"para 15 - In the light of the above observations, it would appear that there is no warrant in Hindu law to regard the Hindu wife as having no say in choosing the place of matrimonial home. Art. 14 of the Constitution guarantees equality before law and equal protection of the law to the husband and the wife. Any law which would give the exclusive right to the husband to decide upon the place of the matrimonial home without considering the merits of the claim of the wife would be contrary to Art. 14 and unconstitutional for that reason."

Again on page 303 at para 18 the Court has further observed as under:

"Due to the financial difficulties of the husband

and comfortable position of the wife and also due to the discouraging conduct of the husband towards the wife, we are of the view that the wife had a reasonable excuse for not resigning her job and for not coming to live with the husband at Delhi. The question of the wife withdrawing herself from the society of the husband did not arise at all because the husband and the wife had not been able to decide where the matrimonial home should be set up. The fault, if any, for the lack of any agreement between them on this point was not of the wife and may be said to be of the husband."

13.3 The learned counsel for the respondent, in support of his contention, relied on the decisions in the case of RISHI RAJ ARORA VS. CHANDER KANTA ARORA reported

in II (1985) DMC 28 (Delhi), PRABHAKAR VS. SOU. MANGALA reported in I (1991) DMC 620 (Bombay), LAXMAN RAO VS. VIDYA CHOUHAN reported in II (1996) DMC 521 (M.P.), AMARJIT KAUR V. BABU SINGH reported in I (1989) MDC 388 (P &H), DR. ARVIND KUNDAN SINGH VS. AVTAR KAUR II(1995) DMC 597, V. SULOCHANA VS. K. RAJAGOPAL reported in I(1997) DMC 139 (Mad.) and also the decision in the case of BHAVENESH KUMAR VS. SHUSHMA SHARMA reported in II(1998) DMC 33.

13.4 The learned counsel for the respondent stated that the respondent wife was and is ready to go to Ulhasnagar and resume at matrimonial obligation. The learned counsel has submitted that because the appellant is drawing about Rs. 2000/- to Rs. 3000/- per month today and staying in a joint family it will not be possible for her to live at Ulhasnagar by giving up her government job as a teacher at Gandhidham where she is getting salary of Rs. 8000/- to Rs. 9,000/- (now). The learned counsel for the respondent wife further submitted that by her wedlock with the appellant husband she gave birth to a boy on 11.11.1993 who is now about 9 years old and therefore the husband has to perform his marital obligation not towards the wife but towards the son also and in view of the present situation leaving a government job by the respondent wife at this juncture is not possible. Therefore, the wife is staying at Gandhidham with a reasonable cause and according to the learned counsel for the respondent wife, the appellant husband has failed to prove the ingredients of desertion in this behalf. He submitted that the proposition that the wife is bound to live with her husband and to submit herself to the authority of the husband could not be read as an absolute and inflexible rule. They had to be applied having regard to the facts and circumstances of the case particularly Section 9 of the Act which provide for restitution of conjugal rights and judicial separation. He has submitted that in fact the Division Bench of the Delhi High Court in the case of MRS. SWARAJ GARG VS. K.M. GARG (supra) has expressed the concept looking to the modern concept that the wife is earning.

MY CONCLUSION:

14. In my view the marriage under the Shastric Hindu Law was a samskara or a sacrament. It being a holy union was indissoluble. The shastras did not accept divorce except in certain communities where it was permitted by custom.

Now the Hindu Marriage Act, 1955, recognises divorce. Section 13 of the Act lays down the conditions or grounds under which one spouse can claim divorce against the other. According to the said Section a marriage can be dissolved only if one of the parties to marriage has committed some matrimonial offence recognised as a ground for divorce.

14.1 Desertion per se was not a ground for relief by way of divorce prior to the amendment of this Section by the Amending Act of 1976 but was only a ground for the relief of judicial separation under clause (a) of Section 10(1) which was in identical terms. The essence of desertion is the forsaking and abandonment of one spouse by the other without reasonable cause and without the consent or against the will of the other. Accordingly desertion under the Hindu Law is a withdrawal of a party from the marital home does not by itself constitute desertion by that party. It is the party who by his or her conduct brings cohabitation to an end that is guilty of desertion. (See: Khorshed Vs. Muncherji (1937) 39 Bom. L.R. 1141. The essential ingredients of this offence in order that it may furnish a ground for relief are:

- (a) the factum of separation; and
- (b) the intention to bring cohabitation permanently to an end - animus deserendi
- (c) the element of permanence which is a prime condition requires that both these essential ingredients should continue during the entire statutory period.

14.2 Desertion in short means a total repudiation of marital obligation. The marriage is an end to two in oneship and to marital togetherness which is the kernel of marriage. A spouse is in desertion if it runs away from his marital obligations, from cohabitation. The "running away" means that he actually leaves the matrimonial home permanently or living in matrimonial home he refuses to perform marital obligations, he ceases to cohabit or abandons his matrimonial obligations.

14.2A I have considered the contentions of the learned counsel for the appellant husband and the learned counsel for the respondent wife. I have also considered the judgement of the Hon'ble Apex Court in the case of Savitri Pandey (supra). In the present case from June 1993 the respondent wife left matrimonial home on the ground of delivery. The respondent wife never returned to the matrimonial home. She has only insisted that

unless and until the appellant husband earns more income and the financial insecurity is removed, she is not prepared to come back to Mumbai and stay with the appellant husband. After June 1993, there is a clear case of factum of separation between husband and wife in view of the fact that the appellant husband is not prepared to go to Gandhidham. It is a clear fact that before their marriage the respondent wife was fully aware that the appellant husband was earning Rs. 1400/- per month. In spite of this fact, the respondent wife got married to the appellant husband. After June 1993, the respondent wife has no intention to go to the matrimonial home of the husband and she has intention to bring cohabitation to an end animus deserendi. The element of permanence which is a prime condition requires that both these essential ingredients should continue during the entire statutory period. In the present case the husband has filed petition somewhere in the year 1998 under Section 13 of the Hindu Marriage Act and on that day two years' period was over and therefore all the three conditions are fulfilled for desertion. Desertion to amount to a matrimonial offence must be for a continuous period of not less than two years immediately preceding the presentation of the petition in view of Section 13 read with Explanation. The appellant husband has been able to prove the ingredients of desertion.

14.2B The appellant husband has not committed any wrong. He has made it clear before marriage that he is earning only Rs. 1400/- per month and in spite of that fact the respondent wife married him and joined the matrimonial home. From June 1993 when the respondent wife left her matrimonial home there was no reason for the same.

14.2C In view of the fact that the respondent wife has left her matrimonial home from June, 1993 and thereafter there is no cohabitation between the appellant and the respondent. The respondent wife is staying at Gandhidham and the appellant husband is staying at Mumbai. There is no intention either on the part of the husband or on the part of the wife to live together as husband and wife.

14.3 I have gone through the judgement of the trial court and record and proceedings in this behalf. I have also gone through the evidence recorded of both husband and wife and in my view the judgement of the decree of the trial court observing that the husband has been able to prove desertion is right. The judgement and decree of the appellate court reversing the said decree is not

legal and valid. Reading Section 13(1)(ib) along with Explanation and the interpretation by the Hon'ble Supreme Court in the case of ADHYATMA BHATTAR ALWAR VS. ADHYATMA BHATTAR SRI DEVI (supra) and other judgements which have been relied on by the learned counsel for the appellant husband. I have discussed the case of ADHYATMA BHATTAR ALWAR VS. ADHYATMA BHATTAR SRI DEVI (supra) in detail. The facts stated in the said case and the facts which are available in the present case are almost identical and in the case of ADHYATMA BHATTAR ALWAR VS. ADHYATMA BHATTAR SRI DEVI (supra), after considering various judgements, the Hon'ble Supreme Court came to the conclusion that absence and omission from her (wife's) side to demonstrate her readiness and willingness to discharge her continuing obligation to return to the matrimonial home establish sufficiently the animus deserendi, necessary to prove legal desertion as required under Section 13(1)(b). In my view the ratio laid down in the case of ADHYATMA BHATTAR ALWAR (supra) is squarely applicable to the present case and in this case the respondent wife has failed to prove her readiness and willingness to discharge her continuing obligation to return to the matrimonial home and therefore decree for divorce has to be passed in favour of the appellant husband. The decree for divorce as prayed by the appellant husband requires to be granted. Both husband and wife have renounced the relationship as husband and wife since June 1993 and from the record of the case also presently the questions which I have asked in the chamber, I am satisfied that both husband and wife had no intention to live together as husband and wife and decided to break off from the relationship of marriage or withdraw that companionship of husband and wife. Desertion means rejection by one party of all the obligations of marriage and permanent forsaking or abandonment of one spouse by the other without any reasonable cause and without the consent of the other.

14.4 I have also considered both the judgements of the Hon'ble Supreme Court in the case of G.V.N. KAMESWARA RAO (supra) and SAVITRI PANDEY (supra). I have set out the facts of the present case earlier. In my view the judgement of the Hon'ble Supreme Court in the case of SAVITRI PANDEY (supra) is on the peculiar facts and circumstances of the case. Looking to the peculiar facts of the case the Hon'ble Supreme Court did not allow the appeal of the appellant wife as the appellant wife is trying to take advantage of her own wrong and in that circumstances of the case, the marriage between the parties cannot be held to have become dead for invoking the jurisdiction under Article 142 of the Constitution

for dissolution of the marriage. In this case the appellant husband has established all the ingredients of desertion. It is no doubt true that the Hon'ble Supreme Court did not grant divorce in the case of SAVITRI PANDEY (supra) on the peculiar facts and the facts of that case is not applicable to the present case because in this case the appellant husband has not committed any wrong and he is not taking advantage of his own wrong. Therefore, the appellant husband is entitled to get for a decree of divorce.

14.5 In my view the test laid down by the Supreme Court in desertion which has been referred in Halsbury's Laws of England, Distress, Divorce (supra) also shows the same test and in this case the appellant husband has been able to prove all the 3 ingredients and therefore I allow the Second Appeal filed by the appellant husband. I, therefore, allow the application filed by the appellant husband being H.M.P. No.. 14 of 1998 and confirm the judgement and decree passed by the Trial Court on 18.6.1999 and reverse the appellate judgement and decree passed by the Joint District Judge in Regular Civil Appeal No. 189 of 1999 dated 15.12.1999.

14.5A Matrimonial matters are matters of delicate human and emotional relationship. It demands mutual trust, regard, respect, love and affection with sufficient play for reasonable adjustments with the spouse. The relationship has to conform to the social norms as well. The matrimonial conduct has now come to be governed by Statute framed, keeping in view such norms and changed social order. It is sought to be controlled in the interest of the individuals as well as in broader perspective, for regulating matrimonial norms for making of a well knit, healthy and not a disturbed and porous society. Institution of marriage occupies an important place and role to play in the society, in general. (Re: Judgement of the Hon'ble Supreme Court in the case of Chetan Dass Vs. Kamla Devi 2001 AIR SCW 1660 - para 14).

14.5B I have considered the judgement of the Hon'ble Supreme Court in the case of CHETAN DASS (supra). In that case the husband himself was leading adulterous life. The Hon'ble Supreme Court has held that the appellant has committed wrong and therefore as contemplated under the provisions of Section 23 of the Hindu Marriage Act, he was not entitled to divorce. In my view the said judgement in the case of CHETAN DASS (supra) is not applicable to the present case because in the present case the appellant-husband has not committed any wrong.

14.6 In my view the respondent wife's insistence of not leaving the job and to join her matrimonial home amounts to desertion and the appellant husband is entitled for a decree of divorce on the ground provided under Section 13(1)(ib) of the Hindu Marriage Act, 1955.

14.7 I have considered the entire aspect and there is no useful purpose to have kept the parties as husband and wife particularly from 1993 both husband and wife have not stayed together. Though I have made efforts to see that wife can go to her matrimonial home at Mumbai or husband can stay at Gandhidham but unfortunately this court's effort to reunite them as husband and wife failed. This court has therefore no alternative but to pass the order for divorce to see that both people can be free to have their own houses in this behalf because to keep both husband and wife when one stays at Mumbai and another at Gandhidham, without intention to stay together, would serve no purpose. Therefore, the marriage is completely broken down and no useful purpose would be served by dismissing the Second Appeal.

14.8 In the result, the Second Appeal is allowed. The judgement and decree passed by the trial court on 18.6.1999 in H.M.P. No. 14 of 1998 is confirmed and that of the appellate court in Regular Civil Appeal No. 189/1999 dated 15.12.1999 is reversed. No order as to costs.

15. The learned advocate for the respondent wife has prayed that his client desires to file appeal in this behalf and therefore this order may be stayed for some time. In view of the facts and circumstances of the case, this order is stayed upto 30.4.2002.

(K.M. MEHTA, J)

(pkn)